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Florence J. Anderson (Pluckard) v. LaMar Anderson : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FLORENCE J. ANDERSON
(PLUCKARD)

Respondent,

vs.

LaMAR ANDERSON

Appellant.

Case No. 8857

BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from a judgment entered by the Honorable Martin M. Larsen, District Judge, in the sum of $13,838.63 for alleged unpaid support money (R. 203, Vol. 2).

The Appellant was the Defendant, and the Respondent the Plaintiff in the court below and will hereafter be referred to as Plaintiff and Defendant.

STATEMENT OF FACTS

From the marriage of these parties, which was dissolved on September 26, 1949, four children were born. The youngest child, Michele is now age 13 years, Brent

is now age 16, Diane will be 18 years of age November 29, 1958, and Craig, the oldest, is now 19 years of age, not living with his mother and is self supporting.

On the 10th day of September, 1949, in contemplation of the divorce proceedings, the Defendant and Plaintiff entered into a stipulation and agreement dividing between them their joint properties accumulated as a result of their joint efforts as husband and wife (R. 4-10, Vol. 1). The portion of that agreement with which we are here in this action concerned reads as follows:

> "It is further agreed that the one-half of the net sales price of this property hereby and herewith given to the Defendant, LaMar Anderson, shall be placed in trust with a trust company located in Phoenix, Arizona, the name of which to be mutually agreed upon and selected by the parties hereto, and that said one-half (½) of net sales price, less the costs of disbursements and handling of the same to be paid by said trust company, is to be paid directly to the said Florence Anderson at the rate of Two Hundred Fifty Dollars ($250.00) per month for the purpose of providing support money for the minor children of the parties. That said payments of Two Hundred Fifty Dollars $(250.00) shall be made until the said one-half of said net sales price has been paid to the Plaintiff herein. *When said one-half of said net sales price of said property has been fully paid to the Plaintiff as herein provided, the Defendant, LaMar Anderson, shall then commence to pay to the Plaintiff, Florence Anderson, the sum of Two Hundred Dollars* ($200.00) *per month for the care, support and maintenance of the minor children herein.*" (R. 8, Vol. 1) (Emphasis added)

The real property above referred to was situated in Phoenix, Arizona, and consists of motel rental units; at all times hereinafter mentioned and during all of the proceedings in the court below, said property remained unsold and the wife had possession thereof and received the income therefrom.

The stipulation and agreement of the parties hereinabove referred to was incorporated into and became a part of the decree of divorce, wherein it was ordered:

> "And it is further ordered that the provisions of said stipulation and each and every one of them ,be and the same hereby are incorporated into this decree by this reference and made a part hereof and that each of said parties receive the respective shares agreed upon therein and that each perform the respective obligations imposed upon each therein and that the support of the minor children of the parties *be paid as provided therein.*" (R. 16, Vol. 1.) (Emphasis added)

On or about the 11th day of August, 1952, Plaintiff filed in the Third Judicitl District Court *a petition for order to show cause* (R. 17, Vol. 1) in which the Plaintiff alleged:

> "That pursuant to said decree Plaintiff was awarded $200.00 per month for the care, support and maintenance of the minor children of the parties. That since the entering of said decree, and up to and including the 10th day of August, 1952, there was due and owing to Plaintiff, under the said decree for the support, care and maintenance of the minor children of the parties, the sum of $7,000.00."

Order to show cause issued (R. 19, Vol. 1). The Defendant cross-petitioned (R. 21, Vol. 1) and alleged:

> "Defendant alleges that under the Decree payments for support are not due to the Plaintiff at this time since the Decree provides that a certain property was to be sold by either of the parties and one half of the net proceeds of the sale applied to the support of the children at the rate of $250.00 per month, and that such property has not been sold." (R. 21, Vol. 1)

The cause argued before the court on the 22nd dav of August, 1952, the court on August 26, 1952, entered its Findings in part as follows:

> *"That under the terms of the divorce decree heretofore entered in the above entitled action the defendant was ordered to pay to Plaintiff for the support and maintentnce of the four minor children of the parties the sum of* $200.00 *per month, i.e.,* $50.00 *for each minor child; that there* has accrued as such support money up to and including August 10, 1952, the sum of $7,000.00, of which amount the defendant has paid $2,515.00, that there is now due and owing to Plaintiff by Defendtnt back support money in the sum of $4,484.41." (R. 24, Vol. 1) (Emphasis added)

On the date last above mentioned the court then made its order and decreed, the pertinent part of which is as follows:

> "1. That plaintiff be and she is hereby awarded judgment against defendant for back support money in the sum of $4,484.41, for $125.00 attorney's fees and costs.
>
> "2. That the property described in para-

graph 3, subsection (c) of the Stipulation and Agreement *specifically incorporated in the divorce decree be sold as soon as possible.* (Emphasis added)

"3. That defendant is hereby found in contempt of court and sentenced to serve 30 days in the County Jail for his wilfull failure to comply with the decree of the court; that said sentence is hereby suspended upon defendant's compliance with the following conditions: That defendant pay to plaintiff the sum of $300.00 per month commencing on the 1st day of September, 1952, and payable on the 1st day of each and every month thereafter until the further order of the court; said payments to be made at the office of the Clerk of Salt Lake County and to be allocated as follows: $200.00 per month as current support money and $100.00 per month to apply on the back support money." (R. 26, 27; Vol. 1)

Thereafter, upon affidavit of the plaintiff, the court, Honorable Clarence E. Baker presiding, did on the 10th day of February, 1953, order the arrest of the Defendant for the wilful failure to comply with the order of the court, dated the 26th day of August, 1952. (R. 30, Vol. 1)

On May 1, 1953, the Defendant petitioned the Third Judicial District Court to vacate its order (R. 31, Vol. 1). The matter was argued to the court and taken under advisement on 12th day of September, 1953. The court on the 5th day of February, 1954, ordered the petition dismissed. (R. 37, 84, 86; Vol. 1). Defendant appealed and this honorable court dismissed the appeal on the ground and for the reason that the appeal had not been taken in time and that failure to do so was juris-

dictional and notice by the court sua sponte, *Anderson, vs. Anderson,* 3 Utah 2d 277, 282 P. 2d, 845 (April 26, 1955).

Thereafter, upon the petition of the Defendant, this court, in the case of *LaMar Anderson, Appellant, vs. The Honorable Clarence E. Baker, Judge of the Third Judicial District in and for Salt Lake County and George Beckstead, Defendants,* issued a temporary writ preventing the imprisonment of the Defendant for contempt for failure to comply with the Baker Decree. This Court in said case, 5 Utah 2d 33 296 Pac. (2nd) 283, refused to make the writ permanent but "remanded the matter to the court below where the equity of confinement pursuant to adjudication of contempt is to be determined and action taken on that determination."

On April 17, 1957, the Plaintiff again by affidavit petitioned in the District Court of Salt Lake County for, among other things, for judgment for alleged unpaid support money in the sum of $11,722.11 (R. 1-3, Vol. 2).

Order to show cause issued (R. 4-5, Vol. 2). The Defendant cross-petitioned and, among other things, alleged: that under the Decree of Divorce, support money was not due to the Plaintiff since the decree provided the Plaintiff was not entitled to support money until certain property had been sold, (hereinafter referred to as the West McKinley St. property), the proceeds divided equally between Plaintiff and Defendant, with Defendant's half thereof placed in trust to be paid over to the Plaintiff until exhausted for the support of the children at the rate of $250.00 per month, and that such property had not been sold (R. 7-8, Vol. 2).

Further, in the alternate, the Defendant alleged that Plaintiff had collected the rents from the property that such should be applied toward such amount, if any, found due or that he be awarded damages for plaintiff's refusal to sell (R. 8, 9, 11, 38; Vol. 2).

Also, further, that by reason of the Plaintiff's refusal to sell the property, she is estopped from asserting any claim for support money (R. 9, Vol. 2).

And again, that the decree entered by Judge Baker on August 26, 1952, was null and void as being contrary to the provisions of this decree of September 26, 1949 (R. 10, Vol. 2).

Also, further, if any money was due and owing, that while defendant has custody of the children, supporting them, that as to back support money, that payment of back support money be fixed at $50.00 a month (R. 10, Vol. 2).

It was stipulated Defendant had paid to Plaintiff $4,931.91 since the entry of the Baker Decree on August 26, 1952 (R. 11, Vol. 2).

Since the divorce, the Plaintiff has lived in Phoenix and at the time of the entry of the decree of divorce on September 26, 1949, and ever since, the Plaintiff was and has been in possession of the West Mckinley Street property (rental units) in Phoenix, Arizona, which according to the Decree of Divorce was to be sold and ½ of the proceeds awarded to Defendant, but to be held in trust and paid to Plaintiff for the support of the children at the rate of $250.00 per month and when said ½ had been paid to Plaintiff (exhausted)

then the payment of support money at the rate of $200.00 per month was to become commence (R. 41, Vol. 2). It is and was income property consisting of seven rental units (R. 42, Vol. 2). Plaintiff always collected the rents, appropriating the money to her use (R. 42-53, Vol. 2). She testified she kept no records of the money received, saying however that for each of the years 1950 to 1954 inclusive, the gross receipts amounted to only $100 to $200 (R. 43-53, Vol. 2), and none for 1955 (R. 52, Vol. 2). She had no records for the year 1956, it being in Arizona (R. 52, 53, Vol. 2), however, from July, 1956 to end of year, she received $863.00, so she said (R. 54, Vol. 2). During the forepart of 1956, the units were remodeled by Plaintiff (R. 53, Vol. 2). In 1947, Defendant remodeled 3 of the units at a cost of $3,500.00. (R. 140-141, Vol. 2).

Although Plaintiff testified she had no records of income from the rental units, she did however keep with care records of expenses for the years 1949 to 1952 inclusive and that, although the gross income during this period was only from $100 to $200 per year, the expenses for the same period was $6,293.17 (R. 55-58, 73, 71; Vol. 2) (Exhibit 4-P and 5-P — R. 71, 77; Vol. 2). Plaintiff paid for electricity used on the premises the last four months of 1949 the sum of $119.19, in 1950 the sum of $334.18 with bills missing for three months, in 1951 the sum of $342.73 with bills for four months missing and 1952 for six months, $210.02. (R. 56-58, Exhibit 4-P, Vol. 2).

Defendant who lived in Salt Lake City after the

divorce testified that prior to the divorce, the rental units were approximately 100% occupied all but during the summer months, when they were 80% occupied (R. 108, Vol. 2); that after the divorce in 1949, he made several trips to Phoenix through 1952 and the units were occupied in the same percentages (R. 108-110, Vol. 2); that the 7 units brought in approximately a gross income of $250 a month, leaving a net income of approximately $180.00 a month (R. 108, Vol. 2).

Plaintiff kept no records after the entry of the Baker Decree. She said, "because of its provisions" (R. 56, Vol. 2) except, she says, they have some records after the property was remodeled in 1956.

The property is situated within a commercial zoning area just 133 feet off Grand Ave. which is a main thoroughfare, 3 highways — 60, 70, and 89, and just across the street from the Desert Sun Motel, which is a first class motel (Deposition of Vern R. Quintel p. 16).

At the time of divorce, the property had a fair market value of $15,000 to $20,000 (R. 118, Vol. 2) although Plaintiff in this proceeding testified it was worthless at the time of the divorce (R. 58-59, Vol. 2). However, December 13, 1948, she put its value at $18,000 (Defendant offered Exhibit 3-D R. 60-61, Vol. 2) which was refused.

In the Baker Decree of August 26, 1952, he directed the property sold as soon as possible (R. 26-27, Vol. 2). Plaintiff refused to sell both before and after the entry of this decree (R. 89-115-117-122-124, Vol. 2) and she also refused to list it with a real estate broker for sale.

(R. 62, Vol. 2). She said she had a "For Sale" sign on the property until 1955, also advertised in newspaper with only one inquiry (R. 86-87-90, Vol. 2). However Plaintiff did submit an alleged offer of $197.20 on July 17, 1953, from her uncle, J. Standified (R. 66, Vol. 2) for the purchase of the property (R. 88, 11-D, Vol. 2). On July 23, 1953, counsel for Defendant submitted a counter offer of $2,000.00 net (R. 88-90, 93-95, Vol. 2, Exhibit 10-D) which Plaintiff refused.

In August or September, 1952, after the entry of the Baker Decree, Defendant went to Phoenix and attempted to secure the aid of the Plaintiff's uncle, J. Standified, to whom they owed $3,000 (one-half of which was to be paid by each party) (R. 4 to 16, Vol. 2), to sell the property, but was refused (R. 110-114, 117, Vol. 2). Subsequently, Plaintiff's uncle sued the parties and reduced his claim to judgment and purchased the property at execution sale on April 21, 1955, (Ex. 8-P, R. 91, Vol. 2). The Plaintiff, however, remained in possession and has collected all the rents, which she has appropriated to her own use (R. 42-53, 63, Vol. 2) and in 1956, Plaintiff remodeled the property at a cost of $7,614.88 on her own initiative, without a request of her uncle, under an agreement entered into by Plaintiff and her present husband (R. 66, 70, 91, 164; Ex. 9-P; Vol. 2). She testified that she and her present husband borrowed $2,500 from the First National Bank of Phoenix, Arizona, under a Title I FHA Loan with which to pay for the improvements, of which they applied only $1,500 for this purpose. The cost of remodeling was to be paid from the income to

R. 66-67, 91, Vol. 2). The Plaintiff did not pay the contractor and he filed suit for same (R. 91; Ex. 9-D; Vol. 2). She did not ask her uncle to pay the cost of remodeling, her husband saying it was hers and his obligation (R. 164, Vol. 2). The claim was reduced to judgment and bought at sheriff's sale by the contractor (R. 67, Vol. 2). At the time of this hearing, the redemption period had not expired.

Plaintiff claimed, after the sheriff's sale to her uncle, she had no interest in the property; that her uncle was going to give it to her children in his will (R. 66, Vol 2). However, her present husband, whom she married in February, 1954, and who since had been, with Plaintiff, collecting the rents, testified (R. 158, 161, 163, Vol. 2) he knew nothing of his wife's dealings and arrangements with her uncle (R. 165, Vol. 2).

After the property was remodeled, the Plaintiff received from $250 to $280 a month (R. 161, Vol. 2).

The city of Phoenix has almost doubled its population since the second World War (R. 160, Vol. 2).

The Defendant has never received a credit for the income received from the property against any support money obligations.

On May 16, 1957, the three younger children then under eighteen years of age were adjudged to be neglected by their mother, the Plaintiff herein, by the Juvenile Court of the Superior Court of Maricopa County, State of Arizona, made wards of the court, placed in the custody of the Maricopa County Department of Public Welfare, and placed in a foster home

in Phoenix until July, 1957, when they were placed in the custody of the Defendant, with whom they still reside (R. 189-190, Vol. 2) in Salt Lake City, Utah.

STATEMENT OF POINTS

POINT I.

THE COURT ERRED IN ENTERING JUDGMENT AGAINST THE DEFENDANT FOR THE REASON THAT SUPPORT MONEY DID NOT ATTACH AND BECOME PAYABLE UNTIL THE WEST MCKINLEY ST. PROPERTY HAD BEEN SOLD, ONE HALF OF THE PROCEEDS, THE DEFENDANT'S SHARE, PLACED IN TRUST AND USED UP AT THE RATE ($250.00 per month) FOR THE SUPPORT OF HIS CHILDREN.

POINT II.

THE COURT BELOW ERRED IN FAILING TO FIND THAT THE PLAINTIFF WAS ESTOPPED TO CLAIM ANY SUPPORT MONEY, AS SHE FAILED TO DO EQUITY IN REFUSING AND FAILING TO SELL THE PROPERTY AS PROVIDED IN THE DECREE OF DIVORCE, AND AS DIRECTED BY THE BAKER DECREE OF AUGUST 26, 1952.

POINT III.

IN THE ALTERNATE, THE COURT ERRED IN FAILING TO FIND THAT PLAINTIFF WAS ESTOPPED FROM CLAIMING ANY SUPPORT MONEY BECAUSE OF HER WILFUL FAILURE TO KEEP RECORDS OF THE INCOME RECEIVED AND HER FALSIFICATION OF THE AMOUNT RECEIVED AND BECAUSE OF THE COURT'S INABILITY TO DETERMINE THE AMOUNT OF INCOME RECEIVED FROM THE PROPERTY.

POINT IV

THAT, IN THE ALTERNATE, THE COURT ERRED IN FAILING TO FIND THAT RENTS AND PROFITS RECEIVED FROM THE PROPERTY ARE PROPER AS OFFSETS AGAINST SUPPORT MONEY, IF ANY.

POINT V.

IN THE ALTERNATE, THE COURT ERRED IN FAILING TO FIND THE VALUE OF THE PROPERTY, AND THE AMOUNT OF DAMAGE SUFFERED BY DEFENDANT IN PLAINTIFF'S REFUSAL TO SELL THE PROPERTY.

POINT VI.

THE COURT ERRED IN REFUSING TO ADMIT INTO EVIDENCE DEFENDANT'S OFFERED EXHIBIT 3.

POINT VII.

THE COURT ERRED IN FINDING THAT PLAINTIFF HAD MADE REASONABLE ATTEMPT TO FIND A BUYER FOR THE PROPERTY, AND WAS UNABLE TO DO SO, AND THAT DEFENDANT DID NOT COOPERATE WITH PLAINTIFF TO SECURE A BUYER, AND THAT HE TOOK INCONCLUSIVE STEPS OF HIS OWN TO SELL IT.

ARGUMENT

POINT I.

THE COURT ERRED IN ENTERING JUDGMENT AGAINST THE DEFENDANT FOR THE REASON THAT SUPPORT MONEY DID NOT ATTACH AND BECOME PAYABLE UNTIL THE WEST MCKINLEY ST. PROPERTY HAD BEEN SOLD, ONE HALF OF THE PROCEEDS, THE DEFENDANT'S SHARE, PLACED IN TRUST AND USED UP AT THE RATE ($250.00 per month) FOR THE SUPPORT OF HIS CHILDREN.

The action commenced in the court below was *by affidavit* (R. 1-3, Vol. 2) *and order to show cause,* (R. 4-5, Vol. 2) based upon a divorce decree (R. 15, Vol. 1), in which plaintiff incorrectly alleged that the said decree provided for the payment of $200.00 per month for the support and maintenance of the minor children of the parties. Had the action in the court below been a petition to modify the decree, then the court, without altering the

terms of the original decree which was based upon the facts existent at the time said decree was made, would have been in a position to adjudicate the equities and to give to the wife in that cause any proper relief for which she could show entitlement. It was error for the court below to alter the terms of the original decree by proceeding under an order to show cause. *Cody v. Cody,* 47 Utah 456, 154 P. 952. So long as an original decree stands, the parties are bound by the terms thereof; this court so held a husband, (*Osmus v. Osmus,* 114 Utah 216, 198 P. 2d 233) and a wife must also be so held—at least until she pleads and proves a change in circumstances such as to require, in fairness and equity, a change in the terms of the decree. *Osmus v. Osmus,* supra, and cases there cited.

We do not here contend that a decree of divorce in which a property settlement agreement has been incorporated cannot be modified. Our law provides for *subsequent* changes and new orders, 30-3-5, UCA 1953; but subsequent changes cannot be made without limitation and a court cannot change or modify a judgment at will.

In the instant case (R. 15, Vol. 1), the decree of divorce provides, in part:

> "4. That the plaintiff, Florence J. Anderson, be not awarded any alimony and that henceforth she not be entitled to any; the said plaintiff, having in her stipulation with the defendant, elected to receive a cash award as alimony and as and for complete settlement of the same as provided in said stipulation. * * *
>
> "6. And it is further ordered that the pro-

visions of said stipulation and each and every one of them, be and the same hereby are incorporated into this decree by this reference and made a part hereof and that each of said parties receive the respective shares agreed upon therein and that *each perform the respective obligations imposed upon each therein and that the support of the minor children of the parties be paid as provided therein.*" (Emphasis added)

The stipulation and agreement (R. 4, Vol. 1), the terms of which the court ordered the parties to comply with, provides:

"5. It is further agreed between the parties, subject to the approval of the Court, that the property described in suparagraph (c) of paragraph 3 of this stipulation shall be sold, and that either of the parties may list the same for sale after October 1, 1949, and that the plaintiff, Florence Anderson, may have the income from said property until the same has been sold.

"It is agreed between the parties hereto that the one-half (½) of the net sales price of this property shall be the sole and separate property and money of the plaintiff, and that she receive the same in full payment and satisfaction of any and all present or future claim of alimony from the defendant, LaMar Anderson, and that she waives any and further claim to any right to alimony.

"It is further agreed that the one-half of the net sales price of this property hereby and herewith given to the defendant, LaMar Anderson, shall be placed in trust with a trust company located in Phoenix, Arizona, the name of which to be mutually agreed upon and selected by the

parties hereto, and that said one-half (½) of net sales price, less the costs of disbursements and handling of the same to be paid by said trust company, is to be paid directly to the said Florence Anderson at the rate of Two Hundred Fifty Dollars ($250.00) per month for the purpose of providing support money for the minor children of the parties. That said payments of Two Hundred Dollars ($250.00) shall be made until the said one-half of said net sales prices has been paid to the plaintiff herein. When said one-half of said net sales price of said property has been fully paid to the plaintiff as herein provided, the defendant, LaMar Anderson, shall then *commence* to pay to the plaintiff, Florence Anderson, the sum of Two Hundred Dollars ($200.00) per month for the care, support and maintenance of the minor children herein."

Notwithstanding the provisions of the decree and of the stipulation and agreement as above set out, the court below found said LaMar Anderson delinquent in the payment of support monies in the amount of "$200.00 per month i.e. $50.00 for each minor child" *from the date of entry of the divorce decree* for an accrued total sum of $10,635.50 with interest in the amount of $3,203.13, making a total judgment against the Defendant of $13,838.63 (R. 203, Vol. 2). Included therein was the amount of $4,484.41 found to be owing under the Baker Decree of August 26, 1952 (Findings of Fact, R. 199-202, Vol. 2). In addition to the foregoing award for support money, the court below awarded judgment against the Defendant to the effect that he pay premiums on Beneficial Life Insurance Policies Nos. 251152, 251077, and 158875 in the

aggregate amount of $1,389.48 (R. 203, Vol. 2). From the latter award the Appellant does not appeal and admits owing that amount.

Separation agreements are not contrary to public policy and they are generally enforced by the courts of this country and of England (see 17 Am. Jur., Divorce and Separation, Sec. 722, et seq.); they have been sustained by this court. *Johnson v. Johnson,* 107 Utah 147, 152 P. 2d 426; *Barraclough v. Barraclough,* 100 Utah 196, 111 P. 2d 792; *Jones v. Jones,* 104 Utah 275, 139 P. 2d 222. Our court said, in the case of *Hall v. Hall,* 111 Utah 263, 177 P. 2d 731, at 733:

> "It is true that we have held that a stipulation for an alimony settlement is only a recommendation to the court—Jones v. Jones, 104 Utah 275, 139 P. 2d 222 — but we did not mean by that that it was to be given no weight at all. Absent any proof to the contrary the lower court should assume that the parties best know their own financial standing and capabilities, and accept their stipulations for its face value, unless the record before the court obviously indicates that to accept the stipulation would not accomplish equity. To ignore the wishes of the parties without grounds for doing so clearly is an arbitrary and capricious act."

The agreement between the parties should be enforced and if there is to be subsequent change or a new order made, it must be upon proper procedure and only after a showing by the moving party of a change in conditions since the entry of the decree. *Gardner v. Gardner,*

111 Utah 286, 177 P. 2d 743. In the case of *Openshaw v. Openshaw,* 105 Utah 574, 144 P. 2d 528, this court held that the right of a trial court to modify an alimony or support money award did not extend to installments that had accrued; it follows, does it not, that where, as here, under the terms of the decree, nothing had become due or had accrued, it would not be within the province of the court to enter judgment for a sum not owing thereunder.

In the cause at bar, we do not come before this court on the issue of the responsibility of a father to support his children. Our cause would have little merit if such were our contention. We readily concede that the obligation does exist and that it is the prerogative, and in fact the obligation, of the courts of this state to enforce such an obligation when they are properly called upon so to do.

May we take the liberty of pointing out to the Court that under terms of the Stipulation and Agreement between the parties hereto and the decree of divorce, all Mrs. Pluckard need have done to commence her entitlement to payments of support money in the sum of $200.00 per month by this plaintiff was to sell the property in Phoenix, Arizona and to have exhausted one-half of the net proceeds therefrom at the rate of $250.00 per month. Mrs. Pluckard's entitlement to payments in the amount of $200.00 from Mr. Anderson would have immediately accrued upon the exhaustion of the funds received from the sale, regardless of what amount of moneys the property might have been sold for.

POINT II.

THE COURT BELOW ERRED IN FAILING TO FIND THAT THE PLAINTIFF WAS ESTOPPED TO CLAIM ANY SUPPORT MONEY, AS SHE FAILED TO DO EQUITY IN REFUSING AND FAILING TO SELL THE PROPERTY AS PROVIDED IN THE DECREE OF DIVORCE, AND AS DIRECTED BY THE BAKER DECREE OF AUGUST 26, 1952.

Although it is Defendant's position that there can be no obligation to pay support money until the property on West McKinley Street is sold as contemplated by the original decree and the contract of the parties, in the alternative, he contends that plaintiff is estopped from claiming any support money because of her failure to join in the sale of the property as decreed by both the original decree and the order of Judge Baker on August 26, 1952.

That Plaintiff refused to sell is established by the great weight of the evidence, overwhelmingly so, not only from the testimony of the Defendant to that effect, but from the conduct of the Plaintiff and the course of events that follow. Particularly often Judge Baker held in August of 1952, that the payment of support money was not a condition of the sale of the property, Plaintiff concluded that it was not to her interest to sell and she resisted all efforts to do so and started a course of action to deprive the Defendant of all of the benefits in the property.

Plaintiff made what she regarded as a token effort to comply with the court order when she secured an offer from her uncle for the net sum of $197.20; however, that such was made in bad faith and that she never did

intend to sell is unquestionably established by her conduct in refusing an offer submitted by Defendant's attorney just six days after of $2,000 net. Had Plaintiff consented to this sale, she would not only have complied with the court's orders and the agreement of the parties, but she would have removed any objections of Defendant to the payment of support money. She decided to eliminate any interest of the Defendant in the property and secure it all for herself. To do this, however, Plaintiff had to have the cooperation of her uncle and he obliged by reducing his claim to judgment, which was the obligation of both parties, each to pay one-half, and by his buying the property in at execution sale. That this was a fraud on the Defendant and the Court is apparent from the fact that Plaintiff's uncle never did take possession of the property and Plaintiff not only continued in possession but she continued to collect and keep all of the rents. Furthermore, in 1956, without her uncle's consent or request, she and her present husband, whom she married in 1954, on their initiative proceeded to remodel the property under contract entered into by them in the sum of $7,614.88, intending personally to pay for same. To accomplish this, they secured a $2,500 loan under FHA Title I. Plaintiff made no request of her uncle to pay the remodeling obligation and he did not do so, even though the contractor on default reduced his claim to judgment and purchased it at execution sale (that at the time of the hearing below, Plaintiff and husband were still in possession, the redemption period had not expired. The record doesn't disclose whether

or not they are still in possession), as she and her husband regarded the obligation as theirs and not her uncle's. All of the foregoing occurred notwithstanding the fact that the Plaintiff claimed that she had no interest in the property. No other conclusion can be reached but that Plaintiff never intended, particularly after the Baker Decree, to comply with the terms of the original divorce decree and the order of Judge Baker as to sale of the property. In light of the foregoing, the Defendant contends that the Plaintiff is estopped from any claim as to support money and that his obligation regarding same must again, as of now, be determined in view of the fact that he now has custody of the three younger children, supporting them as a result of their having been taken from the Plaintiff by the Juvenile Court of the Superior Court of the County of Maricopa, State of Arizona and placed in the custody of Defendant and his present wife in Salt Lake City, Utah.

This judgment, if allowed to stand, will inure, not to the benefit of the minor children of the parties, but rather to the benefit of Plaintiff and her present husband, contrary to rule of this court made the Larsen case. *Larsen v. Larsen* (Utah) 300 P. 2d 596.

30 A. Am. Jur. p. 710 Sec. 765.
19 Am. Jur. p. 323 Sec.: 469-479.

POINT III.

IN THE ALTERNATE, THE COURT ERRED IN FAILING TO FIND THAT PLAINTIFF WAS ESTOPPED FROM CLAIMING ANY SUPPORT MONEY BECAUSE OF HER WILFUL FAILURE TO KEEP RECORDS OF THE INCOME RECEIVED AND HER FALSIFICATION OF THE AMOUNT RECEIVED AND BECAUSE OF THE COURT'S INABILITY

TO DETERMINE THE AMOUNT OF INCOME RECEIVED FROM THE PROPERTY.

POINT IV

THAT, IN THE ALTERNATE, THE COURT ERRED IN FAILING TO FIND THAT RENTS AND PROFITS RECEIVED FROM THE PROPERTY ARE PROPER AS OFFSETS AGAINST SUPPORT MONEY, IF ANY.

Points 3 and 4 are so related that they will be discussed together. In the alternate, the Defendant contends that if the court is to make a new contract as to property and hold that payment of support money is not conditioned on the sale of the property, that the contract should be construed as to allow the Defendant a credit for the net amount of the income received from rents for the property by the Plaintiff, which she always collected and used, and as this cannot be determined because of her failure to keep or produce records as to income and her falsification of the amount received, that she should be estopped from climing any support money, or at the very minimum that the Defendant should receive credit of $180, per month, that amount being the fair net monthly rental value of the units.

Up to the date of the Baker Decree of August 26, 1952, Plaintiff kept a record of the expenses incurred in the operation of the property which she says amounted to $6,293.17, and that, although she had no records of income, and she said that during the same period the income amounted to only $100-$200 a year, and that although she had few tenants, the electric charges amounted to approximately $350.00 a year.

In the light of this e.i. failure to keep records and failure to disclose truthfully the amount of income thus preventing the court from determining the amount of income from the property, she ought to be estopped from claiming any support money, particularly since she has always collected the rents from the property and at the very minimum the Defendant should be allowed a credit of $180 per month, that being the net amount the property should have produced and this should date from the date of the first decree, September 26, 1949, as Judge Baker in his decision refused to allow such, as did Judge Larson. Plaintiff should be required to do equity.

POINT V.

IN THE ALTERNATE, THE COURT ERRED IN FAILING TO FIND THE VALUE OF THE PROPERTY, AND THE AMOUNT OF DAMAGE SUFFERED BY DEFENDANT IN PLAINTIFF'S REFUSAL TO SELL THE PROPERTY.

POINT VI.

THE COURT ERRED IN REFUSING TO ADMIT INTO EVIDENCE DEFENDANT'S OFFERED EXHIBIT 3.

Points 5 and 6 are so related that they will be discussed together.

In the alternate, Defendant further contends that he should be allowed a credit against judgment for the damage sustained by him because of Plaintiff's refusal to sell the property in question.

At the time of the divorce in 1949, Defendant testified the property was worth from $15,000 to $20,000 and, although Plaintiff testified that the property was

worthless, in 1948, in a letter to the Defendant's father, at a time when there was no controversy between the parties, Defendant offered "Exhibit 3 D" which was refused in evidence, Plaintiff put a value of $18,000 on the property. In view of this and Plaintiff's refusal to sell as herenbefore discussed, Plaintiff breached her contract and Defendant has been damaged ½ the value of the property, or from $7,500 to $10,000 (R. 8-9, 11, 38, Vol. 2) and he should be allowed a set-off in this amount.

Exhibit D-3 was material and relevant, not only to set a value on the property for the purpose of determining the damage suffered by Defendant but to show the intent of the Parties as to the agreement to sell the property before support money was required to be paid. In view of the fact that Plaintiff was in possession of the income producing property, it would support Defendants contention that it was the intent that no support money be paid while she received income from the property.

POINT VII.

THE COURT ERRED IN FINDING THAT PLAINTIFF HAD MADE REASONABLE ATTEMPT TO FIND A BUYER FOR THE PROPERTY, AND WAS UNABLE TO DO SO, AND THAT DEFENDANT DID NOT COOPERATE WITH PLAINTIFF TO SECURE A BUYER, AND THAT HE TOOK INCONCLUSIVE STEPS OF HIS OWN TO SELL IT.

Defendant contends that, in view of the evidence that there is no basis for the court finding that he refused to cooperate in the sale of the property and that the Plaintiff expended a reasonable effort to find

a buyer and that the Defendant took inconclusive efforts of himself.

For purpose of brevity, we call the court's attention to our discussion under point No. 2 of the evidence relating to the refusal of the Plaintiff to sell the property and of her conduct in depriving the Defendant of his interest in it. We see no reason to belabor the point further.

CONCLUSION

In conclusion, Defendant submits:

1. That there can be only one construction of the agreement of the parties which was incorporated and made a part of the decree of divorce, namely that Defendant was not required to pay any support money until property on West McKinley Street, valuable income producing property, proceeds of which Plaintiff has always received, had been sold and the Defendant's part, ½ of the sale price, had been exhausted for the support of the children.

2. That in any event, because of Plaintiff's failure to sell the property, notwithstanding Judge Baker's order, as a result of which Defendant by Plaintiff's action was deprived of his interest in the property, that she should be estopped from claiming any unpaid support money that to do otherwise would be inequitable, especially as any money received by her would not inure to the benefit of the parties' children, but rather to the Plantiff and her present husband.

3. That in the alternate, that the income received

by Plaintiff from the property should be credited against any obligation of the Defendant and as this cannot be determined as these facts are solely known by the Plaintiff, which information she refuses to give, she should be estopped from claiming any amount whatsoever or at the very minimum, the Defendant should be allowed a credit of $180 per month the net rent value of the premises after the payment of expenses, from the date of entry of the divorce decree to the date of this hearing. Plaintiff should be required to do equity.

4. In the alternate, Defendant should be allowed a credit of from $7,500 to $10,000, the amount of damage sustained by him being, deprived of ½ the value of the property, which resulted from Plaintiff's breach of contract in her refusal to see the property.

Respectfully submitted,

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